REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 30607/2020
DOH: 21 FEBRUARY 2022

1. REPORTABLE: NO/YES
2. OF INTEREST TO OTHER JUDGES: NO/YES
REVISED.

[redacted]
SIGNATURE

8 MARCH 2022
DATE

In the matter of:

YOLANDE FOURIE	APPLICANT
and	
SPRUYT INCORPORATED ATTORNEYS	FIRST RESPONDENT
THE ROAD ACCIDENT FUND	SECOND RESPONDENT
OFFICE OF THE LEGAL PRACTICE COUNCIL	THIRD RESPONDENT

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 8 MARCH 2022

Bam J

A. INTRODUCTION

1. This is an application for an order declaring the two agreements signed by the applicant and the first respondent as contingency fees agreements and, pursuant to thereto, and owing to certain alleged violations of the Contingency Fees Act[1] (the Act) as identified in the applicant's affidavit, that the agreements be declared invalid and unenforceable. The application is opposed only by the first respondent. Both the second and third respondents are not participants. I shall, therefore, refer to the first respondent as the respondent.

2. I deem it necessary to set out the prayers sought by the applicant in her Notice of Motion:

    (i) declaring that the fee agreements between herself and the first respondent are contingency fee agreements, and as such, agreements that are invalid and unenforceable;

[1] Act 66 of 1997

(ii) declaring that the first respondent is entitled to a fair and reasonable fee on an attorney and client scale, together with those disbursements which were reasonably necessary as taxed, and that the respondent be directed to pay over those funds which it has appropriated as its fees to the applicant's attorneys of record, pending the taxation of the new bill of costs;

(iii) directing the first respondent to deliver to the applicant, within 30 days of this order, a fully itemised and detailed accounting in the form of a bill of costs, with the necessary vouchers, reflecting reasonable attorney and client fees of the first respondent, as well as disbursements incurred in the prosecution of case number 30104/2017, in this division;

(iv) directing the first respondent to immediately pay into the applicant's attorneys' trust account the sum of R 966 659.34, which sum shall be retained in trust on behalf of the applicant, pending agreement or settlement of the first respondent's bill of costs;

(v) directing the first respondent to pay interest at the rate of 9.75% per annum from 23 January 2020 to date of payment, both days inclusive, on the difference between the amount reflected in paragraph 4 and the fair and reasonable attorney and client fees due to the first respondent, agreed or taxed; and

(vi) directing the first respondent to pay the applicant's on an attorney and own client scale; and (vii) granting such further and alternative relief.

3. Before going any further, it is necessary to first briefly set out the background to the case. At this early stage, I note that the applicant in her affidavit makes the statement that her agreement with the respondent was partly oral and partly written and that the written memorial as it stands does not reflect the full agreement[2]. In making her case the applicant refers to statements, the origins of which she says may be traced to the oral agreement between her and the respondent. I return to this later in the

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[2] Paragraph 50 of Founding Affidavit; Caselines 001-24

judgement. For now, it suffices to mention that the respnodent denies the oral agreement. Some of the applicant's statements amount to accusations of fraud[3]. It might be apposite to refer to the reasoning of the court in *Global Environmental Trust and Others* v *Tendele Coal Mining (Pty) Ltd and Others*[4], where it was said:

> 'Motion proceedings ... 'are all about the resolution of legal issues based on common cause facts'... 'Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have been admitted by the respondent... together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

4. It is common cause that the two agreements the applicant wants declared as contingency fees agreements were concluded on 4 November 2016 and in January 2020.

B. BACKGROUND

5. Sometime during August 2016, the applicant was injured in an accident whilst being conveyed as a passenger on a motorcycle. She was admitted to Steve Biko Hospital where she was treated as an in-patient. While in hospital, she was visited by a man

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[3] Caselines 001-31

[4] (1105/2019) [2021] ZASCA 13 (09 February 2021), at paragraph 94

named Christo[5]. It is the applicant's case that Christo informed her of the respondent's services and that the latter could assist with prosecuting her claim, based on what Christo described as a '*no win no fee basis*'. In the circumstances the applicant would pay neither fees nor disbursements as the respondent would deduct its fees, which according to Christo, would be limited to 25% of the final award, upon payment.

6. Following her discharge from Steve Biko, the applicant met Christo at her home where Christo presented her with several papers for signature, including a power of attorney. She says she had noted then that the respondent's fees were '*significantly higher than normal*' but Christo explained that this was customary in claims such as the Road Accident Fund claims. Shortly after signing the documents with Christo, the applicant met with the respondent at his offices. She states that she was in poor financial shape at the time. Based on their discussions the applicant applied for certain allowances to be paid to her on a monthly basis. The total amount of the allowances, together with fees and disbursements due to the respondent, would be deducted from the final award.

7. In July 2019, the Fund made an offer to settle the claim in the amount of R 2 010 135.00, which the applicant accepted, based on the advice of one Linton van Van Niekerk, an attorney in the respondent's firm, that it was a fair offer. She said that, at the time, she enquired about fees from counsel but counsel referred her to Van Niekerk. The latter did not provide a clear explanation, according to the applicant.

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[5] The last name has not been supplied

She states that her discussions regarding the settlement were confined only to the offer made by the Fund. The question whether or not a contingency fees agreement existed was never canvassed with her. Neither was the settlement agreement shown to her. I pause to record that van Niekerk, has deposed to an affidavit disputing the claim that he did not provide clear answers when asked about fees. Van Niekerk avowed that he regularly attends court with counsel in relation to personal injury matters. Virtually all of the respondents' clients in the position of the applicant invariably ask about fees when they hear about settlement. He said he informed the applicant that he could not estimate the fees as the answer would require a person who specialises in costs to draw up a bill of costs. Only then would the amount of fees be ascertained. He further added that it would take about six months for the Fund to pay and that she would be contacted at that stage and a bill would be furnished to her.

8. The settlement was signed on 30 July 2019 and made an order of the court[6]. It is common cause that in January 2020, the applicant was paid the amount of R1 469 036, after deductions were made as per the statements[7] she provided to this court.

C. MERITS

9. In her founding affidavit, the applicant refers to the court order of 30 July 2019, paragraph 7, which states that there is no contingency fees agreement. She submits

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[6] Caselines 001-51

[7] Caselines 001-56

that had she been made aware, she would have objected to the statement as it was not factually correct that there was no contingency fees agreement. When she attended the respondent's office in January 2020 to collect the award, she was furnished a statement of account along with several documents. She says she was obviously eager to receive payment as she had waited for many years. As such, she did not have the opportunity to properly scrutinise the bill or raise queries, nor was she informed that she was entitled to have the bill taxed. Having had the opportunity to scrutinise the bill, she was shocked to learn that she would receive an amount of R 1 469 036 and that the respondent had debited an amount in excess of 50% of the capital; notwithstanding that Christo had told her that the respondent would only be entitled to a maximum of 25% of the award. As a consequence, she sought the services of her current attorneys of record.

10. In paragraph 50 of her founding affidavit, the applicant avows, '*As alluded to above, our agreement was partly oral and partly in writing', the terms of which were that the respondent would render services on a 'no win no fee basis*'.

11. Before I refer to the respondent's answers, and isolating the references to Christo for a moment, it would appear that the proper route for the applicant to obtain relief was to seek rectification. I refer in this regard to In *P V v E V*[8]:

> 'Rectification of a written agreement is a remedy available in instances where the agreement, through a common mistake, does not reflect the true intention of the contracting parties or where it erroneously does not record the agreement between the

[8] (843/2018) ZASCA 76 (30 May 2019) at paragraph 13

parties. The predominant requirement for rectification is a common continuing intention of the parties, which is not reflected in the agreement. (See *B v B* [2014] ZASCA 14 para 20). To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law. (See *Tesven CC v South African Bank of Athens* [1999] 4 All SA 396(A) at para 16). It is trite that the onus is on the party claiming rectification to show, on a balance of probabilities, that it should be granted. The major problem before us is that it cannot be said that the respondent discharged the onus in that the trial court did not make any findings on the credibility of any of the witnesses, did not weigh the probabilities and did not state which version it preferred. Its conclusion that there was no consensus between the parties on the matrimonial property regime they wished to conclude seems to stem from an acceptance by the trial court of the versions of both parties. This court cannot, as a court of appeal, make any credibility findings and is thus unable to either accept or reject the evidence of any of the parties. Once the trial court concluded that there was no consensus between the parties, an order for rectification was not competent.'

12. The challenge facing the applicant is the choice of proceedings. She chose the motion route where rectification is not an option. A trial would have been appropriate under the circumstances. There is a further reason why the trial would have been appropriate, and that is the existence of material disputes of fact. In this regard, the respondent, with reference to the applicant's signatures on the two agreements, made the point that both agreements, ex facie, are not contingency fees agreements at all. As to the applicant's claim that the parties' agreement was both oral and written, the respondent disputes any references to an oral agreement. He states that the contention is contrary to the principle of integration.

13. It is apposite to now refer to the comments of the court in *The City of Tshwane Metropolitan Municipality* v *Blair Atholl Homeowners Association*[9]:

> '[63] This court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue....[64] This court's more recent experience has shown increasingly that the written text is being relegated and extensive inadmissible evidence has been led. The pendulum has swung too far....[65] ...'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add, or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B)' [66]...The parol evidence rule, as expounded by Corbett JA in *Johnson v Leal* 1980 (3) SA 927 (A) at 943B, namely, to prevent a party from altering, by the production of extrinsic evidence, the recorded terms of a contract in order to rely upon the altered contract, continues to be a part of our law...'

14. I now turn to the submissions made by counsel during argument with a view to persuade this court to strike down the agreements as invalid and of no force or effect. The focus was on the first agreement, the Attorney Client Fee Agreement, signed on 4 November 2016. The second agreement, which the parties agree was concluded sometime in January 2020, contains only four lines. It reads:

> 'I Yvonne Fourie, with ID... hereby (sic) accepts the discount as afforded to me by Spruyt Incorporated Attorneys. The acceptance of such discount constitutes a new fee agreement and I confirm that I will pay back the total of the discount as allowed if I dispute the statement of account, before any taxation or dispute resolution will take place.'

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[9] 106/2018) [2018] ZASCA 176 (3 December 2018)

15. Firstly, Counsel implored the court for a finding that the two agreements amount to a contingency fees agreement. However, in violation of the Contingency Fees Agreement Act, the respondent appropriated for himself an amount in excess of the permissible limit of 25%, in respect of fees and disbursements. In this regard, the court was directed to clauses 7 and 14 thereof:

16. Clause 7 paraphrased reads:

> *Fees shall be charged at the rate of R 7000 per hour or part thereof exclusive of VAT and disbursements, regardless of whether the time is spent on consultations with any person (including but not limited to Counsel, witnesses and Court officials) … regardless of whom does the work within the attorney's offices. The tariffs of this agreement are more fully specified in Annexure A attached herewith...The client agrees and understands that the hourly rate is significantly higher than normal, but agrees to such tariff due to the fact that Spruyt Incorporated Attorneys will carry all the risk of the litigation...and the fact that Spruyt Incorporated Attorneys will carry all disbursements... for the duration of the litigation process.*
>
> Clause 14: *The client agrees that in the event of it withdrawing the mandate of the Attorney, all fees and disbursements shall immediately become due and payable to the Attorney by the client and the Attorney shall be entitled to retain the client's file until all fees and disbursements are paid in their entirety...*'

17. In respect of clause 7, the pith of the counsel's submission centered on reasonableness of the fees charged. On this score, the court was reminded that the applicant's claim was that of a passenger. It was submitted that the claim involved no complexity. There was no urgency and neither was this area of law obscure or unusual. It required no extra-ordinary investment in terms of time for research to justify the fee. Secondly, the court's attention was drawn to the underlined words,

'regardless of who does the work in the attorney's office'. It was submitted that this implied, regardless of whether it was a non-professional staff member who did the work, that the fee of R 7000 was still applicable; thus, on the basis of those submissions, the court was entitled to exercise its discretion and strike down the agreement as invalid and unenforceable because a rate of R 7000 for the nature of the work involved, regardless of who does the work, cannot possibly be justified.

18. To demonstrate that the agreement was nothing short of a contingency fees agreement, counsel referred to the paragraph dealing with the tariff being significantly higher than normal and the fact that the first respondent carried all the litigation risk. Emphasis was laid on the word risk, and the point was made that the word risk could only refer to the risk of winning or losing the case. The last point dealt with clause 14, with reference to the fees and disbursements being payable immediately in the event of the client terminating the mandate. It was submitted that the conclusion is ineluctable that the agreement was simply a contingency fee agreement dressed up as something else.

19. Counsel for the respondent cautioned against an approach that selects words and isolates lines in a bid to ascertain the meaning and import of a contract, stating that such an approach would be in stark contrast to the principles of interpretation as espoused by our courts from time to time. As an example, counsel for the respondent referred to the meaning assigned by the applicant to the word risk, stating that the word can refer to a plethora of things. It thus could never be seriously argued that the

word risk, in the context of the agreement, can only mean the risk of losing the case as contended by the applicant's counsel.

20. The contentions made by counsel for the respondent are sound. The approach contended for by the applicant's counsel of selecting lines, words and paragraphs from a document to establish the meaning is, simply, impermissible. In *The City of Tshwane Metropolitan Municipality* v *Blair Atholl Homeowners Association*[10]:

> 'It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided…'

21. In *Natal Joint Municipal Pension Fund* v *Endumeni Municipality*[11]:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[15] The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the

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[10] note 7 supra, at paragraph 61

[11] (920/2010) [2012] ZASCA 13 (15 March 2012) at paragraph 18

divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

Alleged fraud

22. I now turn to the case of fraud as adumbrated in the applicant's affidavit. Under the heading titled **Particular Issues with the Bill of Costs and Rate Charged**, the applicant states, 'Having now had the opportunity to peruse the bill of costs, I can confirm that several fees were raised in respect of work which was never actually performed by the first respondent.' In response, the respondent has steadfastly rebuked any imputations of fraud in his conduct. He states that this is just a further example of abuse of court processes on the part of the applicant in that allegations of fraud must be tested under cross examination.

D. CONCLUSION

23. To conclude, I refer to the reasoning of the court in *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) at paragraph 56:

'That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years.[54] Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge

should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order.[55] There had to be 'a bona fide dispute of fact on a material matter'.[56] This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,*[57] this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

24. The question to ask then is: can the respondent's defence as disclosed in his affidavit be said to be an uncreditworthy denial or a palpably implausible version, such that it should be jettisoned out of hand without recourse to oral evidence? The short answer is no. Early on, I began by referring to the applicant's contention that the two agreements she has placed before court are not the entire agreement between herself and the respondent. On this basis alone, motion proceedings should have been excluded as a way of seeking relief. The two agreements before court are the basis for the justiciable issue/s between the applicant and the respondent. To accept from the applicant a version which introduces alleged oral terms concluded between the applicant and Christo, to alter the written memorial, and oral terms, which in any event are emphatically denied by the respondent, would amount to disregarding the Supreme Court of Appeal's admonition as set out in paragraph 14 of this judgement, which, in any event, this court cannot do.

25. Owing to the multiplicity of material disputes of fact, in particular the accusations that amount to fraud, it must have been foreseeable to the applicant from the start that motion proceedings were not an appropriate way to approach the court for relief. For

all these reasons, the applicant's application must fail. As to the costs, it was foreseeable from as early as 20 June 2020 when the present attorneys wrote to the respondent, that the applicant's version would come under severe attack from the respondent. The applicant made the choice anyway and proceeded by way of motion proceedings instead of an action. She must pay the respondent's costs.

E. Order

26. The following order is made:

1. The application is dismissed.

2. The applicant must pay the respondent's costs.

[redacted]

NN BAM

JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES:

APPLICANTS' COUNSEL:	**Adv Ferreira SC**
Instructed by:	A Myburgh

FIRST RESPONDENTS' COUNSEL:	**Adv Potgieter SC**
Instructed by:	A Smith